Wan Nurfarahan bt Wan Abd Munir lwn Pendakwa Raya

MAHKAMAH TINGGI (KOTA BHARU) — RAYUAN JENAYAH NO DA-41S-16–07 TAHUN 2021
MOHAMAD ABAZAFREE PK
30 JUN 2022

Prosedur Jenayah — Rayuan — Rayuan terhadap sabitan dan hukuman — Perayu dituduh di bawah s 464(a) Kanun Keseksaan — Perayu disabitkan dan dijatuhkan hukuman penjara empat tahun — Sama ada pertuduhan adalah sah di sisi undang-undang memandangkan peruntukan undang-undang berkaitan kesalahan yang dinyatakan di dalam pertuduhan tersebut adalah bukan merupakan satu peruntukan kesalahan — Sama ada kecacatan boleh dipulihkan berdasarkan kepada s 156 atau 422 Kanun Tatacara Jenayah — Sama ada perbicaraan semula adalah wajar

Perayu telah dibicarakan di hadapan mahkamah majistret ('MM') atas pertuduhan di bawah s 464(a) Kanun Keseksaan ('KK'). Di akhir kes pendakwaan, perayu diperintahkan untuk membela diri dan perayu telah memberi keterangan dari kandang saksi. Selepas kes ditangguhkan, perayu telah gagal hadir ke mahkamah dan pihak pendakwa raya ('PR') telah memohon MM untuk mengguna pakai s 425A Kanun Tatacara Jenayah ('KTJ'). Majistret telah berpuas hati bahawa perayu telah melarikan diri dan selanjutnya mensabitkan dan menjatuhkan hukuman penjara empat tahun ke atas perayu. Oleh itu, rayuan ini oleh perayu.

Diputuskan, membenarkan rayuan:

(1) Seksyen 464(a) KK bukanlah satu kesalahan. Ia hanya satu tafsiran bagi menjelaskan dalam situasi apa yang dimaksudkan sebagai perbuatan pemalsuan dokumen. Kesalahan-kesalahan bagi perbuatan-perbuatan ini adalah diperuntukkan secara khusus di dalam seksyen-seksyen yang lain seperti ss 465 dan 467 KK. Oleh itu, apabila pihak PR tidak menyatakan peruntukan perundangan yang jelas maka pertuduhan tersebut sama sekali tidak menyatakan sama ada perbuatan perayu tersebut adalah satu kesalahan dan memprejudis perayu. Oleh itu, pertuduhan tersebut adalah satu pertuduhan yang cacat (lihat perenggan 16–18).

(2) Adalah lebih parah apabila tidak langsung dinyatakan peruntukan undang-undang kesalahan tersebut atau dengan kata lain, tidak mendedahkan peruntukan undang-undang yang mewujudkan kesalahan bagi perbuatan yang dilakukan oleh perayu. Sehubungan dengan itu, kecacatan pertuduhan ini tidak boleh diselamatkan oleh s 156 mahupun 422 KK. Perbicaraan di MM adalah satu perbicaraan yang salah

('nullity') kerana pertuduhan yang cacat tersebut. MM sebagai mahkamah perbicaraan, mempunyai tanggungjawab untuk memastikan sebelum sesuatu perbicaraan dimulakan, pertuduhan yang hendak dibicarakan adalah sah dan mematuhi tatacara perundangan. Tugas yang sama turut digalas oleh timbalan pandakwa raya atau pegawai pendakwa yang menjalankan tugas pendakwaan (lihat perenggan 22–24).

(3) Pertuduhan ke atas perayu adalah satu pertuduhan yang cacat. Perayu telah dihadapkan dengan satu perbicaraan yang salah di sisi undang-undang. Sebarang perintah perbicaraan semula adalah sangat tidak adil kepada perayu serta akan memprejudiskan perayu (lihat perenggan 27).

[English summary

The appellant was tried before a magistrate's court ('MC') on a charge under s 464(a) of the Penal Code ('the PC'). At the end of the prosecution's case, the appellant was ordered to enter defence and the appellant gave evidence from the witness stand. After the case was adjourned, the appellant failed to appear in court and the public prosecutor ('PP') requested the MC to apply s 425A of the Criminal Procedure Code ('the CPC'). The magistrate was satisfied that the appellant had absconded and subsequently convicted and sentenced the appellant to four years imprisonment. Hence, this appeal by the appellant.

Held, allowing the appeal:

(1) Section 464(a) of the PC was not an offence. It was only an interpretation to explain in what situation what was meant as an act of falsification of documents. The offenses for these acts were specifically provided for in other sections such as ss 465 and 467 of the PC. Therefore, if the PP did not state clear legal provisions, then the charge did not state at all whether the appellant's act was an offense and prejudiced the appellant. Therefore, the charge was flawed (see paras 16–18).

(2) It was worse when the legal provision of the offense was not directly stated or in other words, not revealing the legal provision that created the offense for the act committed by the appellant. Accordingly, the defect in this charge could not be saved by s 156 or 422 of the PC. The trial at the MC was a nullity because of the flawed charge. The MC as a trial court, had the responsibility to ensure that before a trial begins, the charge to be tried were valid and complied with legal procedures. The same duty was also borne by the deputy public prosecutor or the prosecuting officer carrying out prosecution duties (see paras 22–24).

(3) The charge against the appellant was defective. The appellant was faced with a trial that was illegal. Any order for a retrial would be grossly unfair to the appellant and would prejudice the appellant (see para 27).]

Kes-kes yang dirujuk

Alandu a/l Santhanasamy v PP [2014] 2 MLJ 508; [2013] 1 LNS 1019, MR (dirujuk)
Chong Chee Pak v PP [1948–1949] Supp MLJ 45; [1948] 1 LNS 94 (dirujuk)
Lai Kim Hon & Ors v PP [1981] 1 MLJ 84; [1980] 1 LNS 197, MP (dirujuk)
PP v Dato' Saidin bin Thamby [2012] 3 MLJ 476; [2012] 4 CLJ 15, MR (dirujuk)
PP v Leong Yoon Meow Criminal Revision No 17 of 1953 (tidak dilaporkan) (dirujuk)
Ravindran a/l Ramasamy v PP [2015] 6 MLJ 509; [2015] 3 CLJ 421, MP (dirujuk)
Shawal bin Hj Mohd Yassin v PP [2006] 4 MLJ 334; [2006] 6 CLJ 392, MT (dirujuk)

Undang-undang yang dirujuk

Kanun Keseksaan ss 40(1), 422, 464(a), 465, 467
Kanun Tatacara Jenayah ss 156, 422, 425A

Che Mohd Zulkifly bin Jusoh (CM Zulkifly & Co) bagi pihak perayu.
Ahmad Faris bin Abdul Hamid (Timbalan Pendakwa Raya, Pejabat Penasihat Undang-Undang Negeri Kelantan) bagi pihak responden.

Mohamad Abazafree PK:

PENDAHULUAN

[1] Ini adalah merupakan rayuan perayu ke atas sabitan dan hukuman yang telah dijatuhkan ke atas perayu oleh Mahkamah Majistret Kota Bharu ('MM'). Perayu telah disabitkan bagi satu kesalahan di bawah s 464(a) Kanun Keseksaan ('KK') dan telah dijatuhi hukuman penjara selama empat tahun.

[2] Semasa perbicaraan di hadapan MM, di akhir kes pendakwaan, tuan majistret telah memerintahkan perayu untuk membela diri dan perayu telah memberi keterangan dari kandang saksi. Selepas kes ditangguhkan, perayu telah gagal hadir ke mahkamah dan pihak pendakwa raya ('PR') telah memohon MM untuk mengguna pakai s 425A Kanun Tatacara Jenayah ('KTJ'). Tuan MM telah berpuas hati bahawa perayu telah melarikan diri dan selanjutnya mensabit perayu.

PERTUDUHAN

[3] Pertuduhan ke atas perayu adalah diperturunkan seperti berikut:

> Bahawa kamu pada 29/9/2014 jam lebih kurang 9.00 pagi di Pejabat Penolong Pentadbir Tanah, Pejabat Tanah dan Jajahan Kota Bharu Jalan Hospital di dalam

daerah Kota Bharu, di dalam negeri Kelantan, didapati kamu dengan curang telah memalsukan satu dokumen iaitu Borang 14A Pindahmilik Tanah, Bahagian atau Pajakan GRN 8972 dan GRN 8996 dengan menurunkan cap jari kamu pada ruangan tandatangan pihak pemindah, bagi tanah milik Nik Zulkipli bin Nik Mohamed (591028–03–5203) dengan niat supaya dokumen palsu tersebut digunakan bagi tujuan hendak menipu, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 465(a) Kanun Keseksaan yang boleh dihukum di bawah seksyen 468 Kanun Keseksaan.

BIDANG KUASA MAHKAMAH

[4] Prinsip undang-undang berkaitan rayuan adalah muktamad seperti mana yang dinyatakan oleh Mahkamah Persekutuan dalam kes *Lai Kim Hon & Ors v Public Prosecutor* [1981] 1 MLJ 84; [1980] 1 LNS 197 seperti berikut:

> The principle of law governing appeals in criminal cases on questions of fact is well established, in that the Appeal Court will not interfere unless the balance of evidence is grossly against the conviction especially upon a finding of a specific fact involving the evaluation of the evidence of a witness founded on the credibility of such witness.

[5] Manakala Mahkamah Rayuan di dalam kes *Alandu a/l Santhanasamy v Public Prosecutor* [2014] 2 MLJ 508; [2013] 1 LNS 1019, telah dinyatakan seperti berikut:

> It is well settled that it is in the hands of the trier of facts to assess the quality of evidence and to determine whether the evidence on record justifies a conviction. In so doing if the court orders an acquittal or conviction it cannot be set-aside by the appellate court unless it records a finding that the view taken by the trial court was not a possible reasonable view of the evidence on record (see *Pramod Mandal v State of Bihar (SC)* [2004] 4 LRI 24; *Public Prosecutor v Thenegaran a/l Murugan* [2013] 3 MLJ 328; [2013] 5 CLJ 850).

ISU YANG BERBANGKIT

[6] Terdapat beberapa isu yang dibangkitkan oleh perayu namun mahkamah mendapati isu utama dan asas adalah sama ada pertuduhan yang dikenakan ke atas perayu adalah sah di sisi undang-undang memandangkan peruntukan undang-undang berkaitan kesalahan yang dinyatakan di dalam pertuduhan tersebut adalah bukan merupakan satu peruntukan kesalahan.

ANALISIS DAN DAPATAN MAHKAMAH

[7] Peguam perayu menghujahkan bahawa pertuduhan ke atas perayu adalah cacat di atas alasan ianya telah menyatakan peruntukan undang-undang yang bukan merupakan satu kesalahan. Pertuduhan tersebut dengan jelas menyatakan : '... dengan itu kamu telah melakukan suatu kesalahan di bawah

s 464(a) Kanun Keseksaan ...'.

[8] Seksyen 464(a) KK adalah merupakan satu peruntukan berkaitan definisi 'pemalsuan'. Ia tidak menyediakan sebarang peruntukan kesalahan.

[9] Bagi memudahkan pemahaman, s 464(a) KK diperturunkan seperti berikut:

> A person is said to make a false document —
>
> (a) who dishonestly or fraudulently makes, signs, seals or executes a document or part of a document, or makes any mark denoting the execution of a document, with the intention of causing it to be believed that such document or part of a document was made, signed, sealed or executed by, or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed or executed, or at a time at which he knows that it was not made, signed, sealed or executed; ...

[10] Sesuatu pertuduhan adalah penting bagi sesuatu pendakwaan jenayah. Ia memulakan tindakan pendakwaan ke atas seseorang tertuduh. Peri pentingnya sesuatu pertuduhan adalah dipertahankan oleh undang-undang kerana ia melibatkan hak-hak seseorang tertuduh apabila berhadapan dengan satu dakwaan perbuatan jenayah. Di dalam kes *Public Prosecutor v Dato' Saidin bin Thamby* [2012] 3 MLJ 476; [2012] 4 CLJ 15, mahkamah telah merujuk kepada buku oleh Mimi Kamariah Majid iaitu *Criminal Procedure in Malaysia* (3rd Ed) Kuala Lumpur (1999) di dalam mengulas prinsip perundangan berkaitan pertuduhan seperti berikut:

> The charge is the first step in the criminal prosecution process of an offence. It is a definite allegation. When a person is said to be 'charged with an offence', he is in fact called to appear before a magistrate or a judge and informed of the charge or complaint against him. A charge is important to an offender because it evolves several rights for the offender and safeguards against injustice. The charge is also a notice to the offender of the matter with which he is accused of. For this reason it must convey to him with sufficient clearness and certainty that which the prosecution intends to prove against him and of which he will have to clear himself. The charge is an information to the court which is to try the accused of the matters to which evidence is to be directed (*R v Mohamed Humayoon Shah* [1874] 21 WR Co 72, 82).

[11] Perkara yang sama pernah diulas oleh Mahkamah Persekutuan di dalam kes *Ravindran a/l Ramasamy v Public Prosecutor* [2015] 6 MLJ 509; [2015] 3 CLJ 421 yang telah menggariskan berkaitan pertuduhan seperti berikut:

> Section 152 of the CPC provides that the charge shall 'state the offence with which the accused is charged' and mention 'the law and section of the law against which the offence is said to have been committed'. Section 153 of the CPC provides that 'the charge shall contain such particulars as to the time and place of the alleged offence ... as are reasonably sufficient to give the accused notice of the matter with

A which he is charged'. And when the nature of the case is such that the particulars mentioned in ss 152 and 153 do not give the accused sufficient notice of the matter with which he is charged, s 154 of the CPC provides that 'the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose'.

B

[12] Adalah nyata, sesuatu pertuduhan hendaklah menyatakan peruntukan undang-undang yang jelas menujukkan wujudnya satu kesalahan. Ini penting kerana ia akan menunjukkan sama ada perbuatan seseorang itu adalah satu kesalahan.

C

[13] Apa yang dimaksudkan dengan kesalahan adalah sepertimana tafsiran yang dinyatakan di dalam s 40(1) KK yang telah menafsirkan perkataan 'offence' sebagai bermaksud:

D Except in the Chapter and sections mentioned in subsections (2) and (3), *the word 'offence' denotes a thing made punishable by this Code*. (Penekanan ditambah.)

[14] Oleh itu, adalah menjadi pandangan mahkamah ini bahawa sesuatu peruntukan undang-undang hanya boleh dikatakan mewujudkan satu E kesalahan jika peruntukan tersebut menyatakan dengan jelas sesuatu perbuatan tersebut adalah boleh dihukum.

[15] Di dalam *Barron's Dictionary of Legal Terms* (4th Ed) penulisnya, Steven F H Gifts telah menafsirkan 'Penal Law' sebagai bermaksud 'a law to preserve public order that defines an offense against the public and inflicts a penalty for its violation'.

[16] Di atas pertimbangan-pertimbangan ini, mahkamah bersetuju di atas G hujahan peguam perayu bahawa seksyen yang dinyatakan tersebut bukanlah satu kesalahan. Ia hanya satu tafisran bagi menjelaskan dalam situasi apa yang dimaksudkan sebagai perbuatan pemalsuan dokumen.

[17] Manakala kesalahan-kesalahan bagi perbuatan-perbuatan ini adalah H diperuntukkan secara khusus di dalam seksyen-seksyen yang lain seperti ss 465 dan 467 KK. Oleh itu, apabila pihak PR tidak menyatakan peruntukan perundangan yang jelas maka pertuduhan tersebut sama sekali tidak menyatakan sama ada perbuatan perayu tersebut adalah satu kesalahan dan bagi mahkamah ini memprejudis perayu.

I

[18] Sayugia itu, pertuduhan tersebut pada hemat mahkamah adalah satu pertuduhan yang cacat. Ini membawa kepada persoalan seterusnya iaitu sama ada kecacatan ini boleh dipulihkan berdasarkan kepada ss 156 atau 422 KTJ.

[19] Kedua-dua seksyen tersebut menyatakan: A

Seksyen 156:

No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by that error or omission. B

Seksyen 422:

Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of: C

(a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial or in any inquiry or other proceeding under this Code;

(b) the want of any sanction; or D

(c) the improper admission or rejection of any evidence,

unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

[20] Mahkamah Persekutuan di dalam kes *Ravindran Ramasamy* telah membincangkan kedua-dua peruntukan ini dan merumuskan: E

Sections 156 and or 422 of the CPC would not save a defective charge where the accused was misled and a failure of justice had occasioned. In the instant case, that the appellant would have been misled and that a failure of justice would have been occasioned was most apparent. F

[21] Manakala di dalam kes *Shawal bin Hj Mohd Yassin v Public Prosecutor* [2006] 4 MLJ 334; [2006] 6 CLJ 392, Hakim Azahar Mohamed PK (pada ketika itu), telah menegaskan bahawa kedua-dua seksyen tersebut hanya wajar diguna pakai apabila ia melibatkan isu-isu teknikal sahaja. Ia dinyatakan seperti berikut: G

In my view s 156 has application only in a situation where there is an error either in stating the offence or the particulars required to be stated in the charge or there is an omission to state the offence or those particulars. *In other words that section provides for a cure should there be any non-compliance with the technical provisions of the law. I do not think that provision can be invoked in the case at hand in a situation where the charge was defective as disclosing no offence under the section of the Act*. I do not consider that this is an irregularity curable under s 156. In the same way, the application of s 422 is constrained to remedy no more than technical defects in the charge. To me where a trial in the court below is conducted on the basis of a charge which is defective as not disclosing an offence under the relevant section, it is an illegality which cannot be cured by s 422. I should point out that the case of *Msimanga Lesaly v Public Prosecutor* [2005] 4 MLJ 314; [2005] 1 CLJ 398 relied on by the learned deputy is distinguishable on its facts ... In stark contrast to that case, H I

A in the case before me it was not a minor defect; the charge was defective as disclosing no offence in law.

The defect in the charge was a matter of substance and not merely of form. This was not a mere technical non-compliance of any provision of the law which can be condoned as an irregularity. I do not think it can be cured without causing injustice B to the appellant. In my view, this was not a defect, disregarding it would not occasion a miscarriage of justice. To me the charge as framed did not disclose any offence and therefore I have no doubt that the defect of this kind was an illegality. I think the appellant was left in doubt as to the offence of which he had been convicted and sentenced. It is a fundamental principle of criminal law in our C country that an accused person should know accurately of what offence he has been convicted and sentenced. In my judgment the error in the charge did cause prejudice and injustice to the appellant. In the end, I have no hesitation in saying that the charge framed against the appellant was bad in law. When looked in this way, one can see that there has been a substantial miscarriage of justice. As a consequence, the conviction in this case was a nullity. (Penekanan ditambah.) D

[22] Adalah jelas keputusan-keputusan mahkamah duluan ini adalah konsisten di dalam menolak penggunaan kedua-dua seksyen ini apabila pertuduhan jelas tidak menunjukkan elemen kesalahan. Bagi mahkamah, di E dalam kes semasa, ia adalah lebih parah apabila tidak langsung dinyatakan peruntukan undang-undang kesalahan tersebut atau dengan kata lain, tidak mendedahkan peruntukan undang-undang yang mewujudkan kesalahan bagi perbuatan yang dilakukan oleh perayu.

F **[23]** Sehubungan dengan itu, mahkamah memutuskan bahawa kecacatan pertuduhan ini tidak boleh diselamatkan oleh ss 156 mahu pun 422 KK.

[24] Selanjutnya, mahkamah turut berpandangan bahawa perbicaraan di MM adalah satu perbicaraan yang salah ('nullity') kerana pertuduhan yang G cacat tersebut. MM sebagai mahkamah perbicaraan, mempunyai tanggungjawab untuk memastikan sebelum sesuatu perbicaraan dimulakan, pertuduhan yang hendak dibicarakan adalah sah dan mematuhi tatacara perundangan. Tugas yang sama turut digalas oleh timbalan pandakwa raya atau pegawai pendakwa yang menjalankan tugas pendakwaan. Perkara ini pernah H disentuh oleh Hakim Thomson CJ di dalam kes *Public Prosecutor v Leong Yoon Meow* Criminal Revision No 17 of 1953 (tidak dilaporkan) yang menyatakan seperti berikut:

I It is a very good working rule for magistrates and police officers to hold that where what an accused person is alleged to have done cannot be described in the language of any statutory provision creating an offence or where it seems necessary to depart from the language of the section in framing a charge, then the probability is that no offence has been committed. *For the common offences the forms of charge are well known and there is little room for error but in the case of the less common offence the prosecuting officer should in every case ask himself: 'Can the facts which I think I can*

prove against the accused be described in the words of the section under which I am proposing to prosecute him?' If the answer to that question is 'No' then he should accept it that a prosecution is very unlikely to succeed and he should take legal advice before proceeding further. As far as the magistrate is concerned, he should scrutinize every charge brought before him and compare it with the wording of the section under which it is brought. If it does not set out all the ingredients of the alleged offence as described in the section he should refuse to proceed further with it, and if it cannot be amended so as to bring it in accordance with the section it should be dismissed. (Penekanan ditambah.)

[25] Mahkamah selanjutnya turut menimbang sama ada wajar bagi mahkamah ini memerintahkan satu perbicaraan semula. Sebagai panduan, mahkamah telah merujuk kepada *Mallal's Criminal Procedure* (5th Ed) di perenggan 10476 yang menyatakan:

A new trial would mean the case is reopened and the accused is retried on all the charges originally framed. A retrial would probably be ordered in cases where it is in the interests of justice to order one. The appellate court has a wide discretion. Generally a new trial will be ordered where although there was actually a case to answer, the case was rejected. A retrial may also be ordered when there is misdirection as to the onus of proof, or when the trial judge has prevented the prosecution from adducing all the evidence it has desired to. Sometimes even though there is a fault in the decision of the lower court the appellate court may be able to do justice without ordering a new trial.

Generally a retrial cannot be obtained on the ground that new evidence is produced unless it is shown that such evidence could not have been produced at the first trial since otherwise there would be no finality to the litigation. A retrial will not be ordered where the prosecution has through its fault failed to present its case properly. Indeed a retrial cannot be ordered where to do so would give the prosecution a second chance to make good the inadequacy of their evidence. A retrial will also serve no purpose where the conviction is against the weight of the evidence. In such a case the appropriate step for the appellate court to take is to quash the conviction and set aside the sentence.

[26] Mahkamah turut terpanggil merujuk kata-kata Hakim Callow J di dalam kes *Chong Chee Pak v Public Prosecutor* [1948–1949] Supp MLJ 45; [1948] 1 LNS 94 yang telah mengungkapkan:

Nor can I order re-trial, for the charge in the court below being one without the law, it follows that the proceedings were a nullity, and while the re-trial of a trial may in appropriate circumstances be ordered, the re-trial of a nullity is an impossibility.

[27] Adalah jelas di dalam kes ini, pertuduhan ke atas perayu adalah satu pertuduhan yang cacat. Perayu telah dihadapkan dengan satu perbicaraan yang salah di sisi undang-undang. Pada pandangan mahkamah sebarang perintah perbicaraan semula adalah sangat tidak adil kepada perayu serta akan memprejudiskan perayu.

A KESIMPULAN

[28] Di atas pertimbangan-pertimbangan yang dinyatakan, mahkamah dengan ini memutuskan bahawa rayuan perayu adalah dibenarkan. Oleh yang demikian sabitan serta hukuman oleh MM adalah diketepikan.

B

Rayuan dibenarkan.

Dilaporkan oleh Nabilah Syahida Abdullah Salleh

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